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THE RUSSIAN SUGAR BOUNTY CASE.

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Supreme Court of the United States.

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ROBERT E. DOWNS,

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vs.

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BRIEF ON BEHALF OF PETITIONER.

ERNEST A. BIGELOW,
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THE UNITED STATES.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF CONTENTION THAT NO BOUNTY OR GRANT WAS PAID OR BESTOWED BY THE RUSSIAN GOVERNMENT UPON THE EXPORTATION OF A CERTAIN CONSIGNMENT OF SUGAR, WITHIN THE MEANING AND SCOPE OF SECTION FIVE OF THE TARIFF ACT OF JULY 24, 1897.

STATEMENT OF THE CASE.

The question which the Court is asked to determine is: Does the Russian Government pay or bestow, directly or indirectly, any bounty or grant upon the exportation of sugar, within the meaning and scope of Section 5 of the

tariff act of July 24, 1897, imposing a countervailing duty equal to the amount of any bounty or grant so paid or bestowed?

Section 5 provides:

"That whenever any country, dependency or colony "shall pay or bestow, directly or indirectly, any bounty "or grant upon the exportation of any article or mer- "chandise from such country, dependency or colony, and "such article or merchandise is dutiable under the pro- "visions of this Act, then upon the importation of any "such article or merchandise into the United States, "whether the same shall be imported directly from the "country of production or otherwise, and whether such "article or merchandise is imported in the same condition "as when exported from the country of production or has "been changed in condition by remanufacture or other- "wise, there shall be levied and paid, in all such cases, in "addition to the duties otherwise imposed by this Act, an "additional duty equal to the net amount of such bounty "or grant, however the same be paid or bestowed. The "net amount of all such bounties or grants shall be from "time to time ascertained, determined and declared by "the Secretary of the Treasury, who shall make all need- "ful regulations for the identification of such articles and "merchandise and for the assessment and collection of "such additional duties."

In 1898 the Secretary of the Treasury decided that a certain transaction between citizens, sanctioned by the Russian law, constituted the payment of a bounty, and on December 12th (T. D., 20,407), he proclaimed the net amount thereof in accordance with the provisions of Section 5 above. Subsequently, on April 20, 1900 (Circular No. 50), pending certain treaty negotiations with Russia, this order was suspended; but the suspension was revoked February 14, 1901 (Circular No. 110).

Prior to the suspension of the order this petitioner imported certain Russian sugars, upon which the Collector

of the port of Baltimore imposed an additional or countervailing duty equal to the amount of the alleged bounty as proclaimed by the Secretary of the Treasury. The petitioner paid this duty under protest, and appealed to the Board of United States General Appraisers (by authority of Section 14, Administrative Customs Act, June 10, 1890), alleging that the Russian Government did not pay or bestow a bounty or grant on the exportation of this sugar, within the meaning of Section 5 of the Act.

The Board of Classification of the United States General Appraisers overruled the protest, two of the three members deciding that "A bounty or grant within the "meaning of Section Five of our Tariff Act has been paid "upon the exportation of this sugar, so as to work a "benefit or advantage to the Russian sugar exporter, as "follows:

> "FIRST.—Upon the exportation of the sugar, the "Government remitted or refunded the excise tax "thereon, or otherwise canceled the indebtedness "of the sugar manufacturer, so that he was enabled "to place his product upon the market free from "the burden of either the regular or additional ex-"cise tax; and
>
> "SECOND.—The certificate which the Government "issued to him upon the exportation of his sugar "had a substantial market value, and was trans-"ferable, and operated as a premium, grant, bonus "or reward."

The third member of the Board dissented on the grounds:

> "FIRST.—That the remission, on exportation of "sugar, of the excise tax, does not constitute a "bounty or grant upon the exportation."

"SECOND.—That a bounty or grant need not be "money, but may consist of a valuable right, *con-* "*ditioned, however, upon exportation*, in order to "be within the purview of Section Five, Act of "July 24, 1897."

"THIRD.—That Russia does apparently confer a "valuable right or privilege in her domestic mar- "kets upon her manufacturers of sugar, *but this* "*right is not conditional upon exportation.*"

On appeal to the United States Circuit Court for the District of Maryland, Judge Morris affirmed the decision of the majority of the Board, but expressly on the ground that to do otherwise would require a carefully considered written opinion, and that delay would prevent this important case from being heard at the November Term of the Circuit Court of Appeals. The learned Judge then goes on to say: "I am free to say that the question ap- "pears to me a very close one, and that I incline to the "views expressed in the dissenting opinion of General "Appraiser Tichenor."

The Circuit Court of Appeals affirmed the decision of the courts below, the Court saying: "We find that the "Russian exporter of sugar obtains from his Government "a certificate, solely because of such exportation, "which is worth in the open markets of that country "from R. 1.25 to R. 1.65 per pood, or from $1\frac{8}{10}$ to $2\frac{35}{100}$ "cents per pound; therefore we hold that the Govern- "ment of Russia does secure to the exporter of that country, "as the inevitable result of its action, a money reward or "gratuity whenever he exports sugar from Russia." The learned Court further says: "In affirming the decree of "the Court below we also affirm the judgment rendered by "the Board of General Appraisers, whose opinion so fully "expresses our views and so ably presents the facts in-

"volved herein and the law applicable thereto, that we "deem it entirely appropriate to adopt the same as part of "the opinion of this Court."

The grounds of the decision of the Circuit Court of Appeals, therefore, are two-fold:

FIRST.—That the remission of the excise tax, upon the exportation of the sugar, was a bounty or grant within the scope of Section Five.

SECOND.—That the issuance to the exporter of a certificate which had a substantial market value operated as a bounty or grant upon exportation.

SPECIFICATION OF ERRORS.

The decree of the Circuit Court of Appeals having affirmed the decisions of the Circuit Court and of the Board of General Appraisers that Russia paid or bestowed a bounty or grant on the exportation of these sugars, the petitioner herein respectfully alleges that the decree is in error in that the said decisions were not reversed, and the protest of the importer sustained, on the ground that no bounty or grant was in fact paid or bestowed on the exportation of these sugars within the meaning and scope of Section 5 of the Tariff Act of July 24, 1897.

Synopsis of Argument.

Analysis of the Russian Sugar Law, its causes, theory and application, and the alleged "bounties" thereunder (pp. 7-25).

Point One: Section 5 applies only to bounties on exportation, and the purchase price of the "free sugar" export certificate is not such a bounty (pp. 26-31).

Point Two: Even if the section were not limited to bounties conditioned on exportation, the purchase price of the certificate would not be within the scope of the section (pp. 32-37).

Point Three: It is not true that the Russian Law requires the exportation of any portion of the product as a condition precedent to the sale of the balance in the home market (pp. 38-40).

Point Four: What the Brussels Conference really decided and the effect thereof (pp. 41-42).

Point Five: The remission of excise taxes is not a bounty on exportation within the scope of Section 5 (pp. 43-46).

Point Six: The importer must have the benefit of the doubt, if any doubt exists (pp. 47-48).

Conclusion: (p. 48).

ARGUMENT.

Analysis of the Russian Sugar Law, its causes, theory and application, and the alleged "bounties" thereunder.

I.

CAUSES.

The Russian Sugar Law is not a covert scheme to pay concealed bounties on exportation, but the genuine effort of a paternalistic government to wrest the control of the trade from a pernicious Sugar Ring and to regulate the industry in the interest of producer and consumer alike.

Some years prior to the enactment of the law the overproduction of sugar in Russia became so great that the Government was obliged to interfere to save the refineries from ruin. At first, by the payment of large export bounties, the Government hoped to rid the market of its surplus sugar; then, finding that this increased rather than lessened the evil of overproduction, export bounties were abolished and in their stead the Government sanctioned the formation of a syndicate or trust, which should control production. The trust proceeded to put up prices to an exorbitant figure, and maintained them there by exporting the surplus. On one occasion the Government was obliged to import sugar to supply the demand owing to the action of the Ring in exporting the surplus of the year before. The prevailing high prices attracted new capital into the industry; production increased enormously, and finally when prices abroad fell excessively owing to the action of Germany, Austria and France in paying large export bounties, the refiners applied once more to the Government to avert the threatened crisis.

After much investigation of the subject the Government abolished the sugar trust, and promulgated the present law, whose objects may be best stated in the words of the recent Identical Note delivered to the representatives of the powers at St. Petersburg:

"The Russian Government only regulates the distribution " of sugar on its home market, its purpose being on the one " hand to antagonize overproduction of sugar and on the " other gradually to bring about lower prices and greater " consumption for that product in this country. It pro- " tects home consumption against rises in the prices and " production against sudden and considerable falls."

The British Consul at St. Petersburg says in his report on the beet root sugar industry in Russia (No. 471, Misc. Series, July, 1898):

" The Government having refused to prolong the exist- " ence of the syndicate, ultimately introduced a measure " of its own, which was anything but favorably received " by those engaged in the production of sugar. Recog- " nizing the necessity of taking steps, called forth by the " present critical position of the sugar industry, and to " guarantee the home market with sugar as well as the " fixing of a moderate price, it is Imperially sanctioned," &c., &c.

The Russian delegate to the Brussels Conference of 1898, says:

" The Government, apprehending a serious crisis, took " hold of the interests of the sugar manufacturers; it had " also to make sure of the collection of the 50 million " roubles of excise duty " (Rep. of Conf., pp. 47, 48).

II.

THEORY OF THE LAW.

A high and practically prohibitive protective tariff eliminates foreign competition and ensures to the Russian

sugar manufacturer a highly profitable home market (Stip 9, Rec., p. 10; Opinion Board of Appraisers, Rec., p. 29). On the other hand, to protect the consumer against excessively high prices, the law directs the ministry to fix a maximum beyond which the price of sugar shall not go (Law, § 1, *c.*, Rec., p. 41), and a large amount of sugar known as the "indivertible reserve" is set aside from the output of each mill (Law, § 1, *b.*), to be thrown upon the market in case the maximum limit is exceeded (Law, § 7, Rec., p. 41). Revenue for the Imperial treasury is supplied by an excise tax on all sugar produced, the tax being remitted on export (Law, § 9, Rec., p. 41).

The chief object of the Government, however, was to prevent, or at least to discourage, overproduction with its attendant evils, and to accomplish this the law *penalizes* overproduction by imposing thereon double the normal excise tax! That is to say, the ministers estimate annually in advance the amount of sugar which will be required for consumption, and the law imposes thereon the normal excise tax of R. 1.75 per pood (36 lbs.) All sugar produced in excess of the amount so estimated for consumption (except that set aside as "indivertible reserve") is required to pay not only the normal excise tax, R. 1.75, but an additional tax in the same amount (Law, § 5, Rec., p. 41). The sugar required for consumption and which pays the normal tax is called "free sugar"; the excess, subject to the additional tax, is known as "surplus," "free surplus" or "free reserve."

III.

Distribution of "free sugar."

The diverse conditions of soil and climate, and the excessive variations in the quantity and quality of the beet crop, make it impossible for the manufacturers to limit

production so that it shall just equal consumption, *i.e.*, so that all their sugar shall be "free" and liable only to the normal tax. It is inevitable that in most campaigns production will exceed the amount estimated to be required for consumption, although the latter figure is constantly increasing.

In order, therefore, that all manufacturers may share justly in the right to sell "free sugar," *i. e.*, that which is subject to the normal excise, and to ascertain the proportionate quota of each factory, the ministry are directed by the law to estimate the probable national consumption and the probable production, *and the product of every factory is then divided up according to the ratio between these estimates* (Law, § 1*a*; Reg. §§ 1, 2, 3, 4; Rec., pp. 40, 42, 43). For instance, if the ministers estimate the national consumption at 35 million poods, and the probable production at 50 million poods, 35/50 of the daily production of each factory will be set apart as "free sugar" by the inspector, and 15/50 (less a certain portion of "indivertible reserve") will be set apart as "surplus" (Law, § 3 *et seq.*; Rec , p. 41; Cons. Rep., Rec., p. 60).

His quota of "free sugar" the manufacturer can sell upon the home market under the normal excise of R.1. 75 per pood (Stip. 4*a*; Rec., p. 9). His "surplus" he may either (1) place on the home market by paying the double excise (Law, § 5; Rec., p. 41); or (2) leave in the mill where it is not subject to the tax, (*Ibid*); or (3) have transferred to the production account of the next campaign, where it will serve to increase the amount on which is figured his percentage of "free sugar" (Reg. 19; Rec., p. 50); or (4) export, free from excise (Law, § 9; Rec., p. 41).

IV.

"Transfers."

This impartial division of the product of all factories into "free sugar" and "surplus" is not as equitable as it appears, for the right to issue "free sugar" into the home market is more valuable to the manufacturer located at Moscow or St. Petersburg, where the demand ensures maximum prices, than to one located at a small provincial town. The Moscow manufacturer could reap a large profit not only on his quota of "free sugar," but also on his "surplus," if he were allowed to sell the latter at the normal excise, *i. e.*, as "free sugar."

Inasmuch, however, as the total amount of "free sugar" allowed for the Empire is "definitely fixed at the total amount required for consumption" (Stip. 1, Rec., p. 8), it is obvious that the Moscow manufacturer can enlarge his Right of Issue, *i. e.*, can convert his "surplus" into "free sugar," only at the expense of some other manufacturer by inducing the latter to convert a like quantity of his "free sugar" quota into "surplus."

That is to say, the Moscow manufacturer can enlarge his Right of Issue into the home market only by purchasing the Right belonging to some other manufacturer. The total Right of Issue belonging to the two is not increased by this process, but it is all vested in the Moscow manufacturer, and thus the ratios established by the ministers are not disturbed.

As it is immaterial to the Government how the manufacturers redistribute among themselves the right to issue "free sugar" into the home market, provided the total amount allowed as "free sugar" for the Empire is not exceeded, the law (Regs. 39, 40, Rec., p. 57) provides a

method by which one manufacturer *may cede to another his Right of Issue*, as follows:

"Section 39.—A manufacturer may cede to another "manufacturer his right to place on the home market "free, *i. e.*, without the payment of an additional tax, his "allotted quota of sugar.

"Section 40.—In relation to such cession, the following "rules may be observed:

"(1.) The manufacturer who assigns to another manu- "facturer his right to dispose of a certain quantity of "sugar free must give notice thereof to the local excise "board, which first orders to be held at the mill a quan- "tity of free sugar equal to that about to be assigned, "and immediately thereupon duly communicates with "the excise board having jurisdiction of the mill in "whose favor the assignment is being made.

"(2.) If the assignment is accepted by the latter mill, "the quantity of free sugar in said mill is correspond- "ingly increased by transfer from the free surplus (not "from the indivertible reserve), of which a memorandum "is made by the excise officers in charge; thereupon the "excise board, from which the communication in relation "to the assignment of free sugar has been received, is "notified of the acceptance of said assignment.

"(3.) Upon receipt of the notification that the assign- "ment has actually been accepted, the quantity of 'free "sugar' at the factory by which the assignment has "been made is correspondingly reduced by transferring "the same into the free surplus (or free reserve), of which "a memorandum is made by the excise officer in charge.

"(4.) The reduction of the quantity of free sugar at one "mill and the increase thereof, by assignment, at another "mill, are entered in the proper books of the mill."

Thus, by a mere bookkeeping operation, without any actual transfer of sugar from one mill to the other, the assignee's "surplus" sugar has been converted into "free sugar," which he can sell at the normal excise; and the

assignor's "free sugar" has become "surplus," which, as we have seen, he can only (1) place on the home market by paying the double excise; or (2) export; or (3) leave in the mill where it is not subject to the tax; or (4) have transferred to the production account of the next campaign (*Supra*, p. 10).

Should he conclude to export what has now become "surplus" sugar, the transferor will obtain in the foreign market a price which is, as a rule, less than that which he would have obtained had he sold his sugar as "free" on his local market. Accordingly, *the consideration which the Moscow manufacturer must pay to induce the other to transfer his Right of Issue is measured by the difference between the home market price and that prevailing on the foreign market.*

To quote the American Consul (Rec., p. 17): "As the "first and second methods of disposing of his sugar (by "selling under the double tax or exporting), are less ad- "vantageous than placing the article on the home market "as free sugar, the manufacturer who ceded his right "receives from the manufacturer who acquired the right "the price per pood agreed upon between them, *which is* "*usually determined by the difference existing at the* "*moment between the price obtainable for the sugar on* "*the home market and the price obtainable by sale abroad.* "This is what is termed a transfer. Dependent upon the "fluctuations in price of sand sugar in Russia and abroad, "the price for these transfers also varies; therefore, the "person who sells the transfer, the right of issue into the "home market, charges several copecks more than the "difference mentioned above. This is done on account "of the risk that is taken that sugar prices abroad may "fall, and also for the trouble involved in exporting, &c. "EXAMPLE: Price of sand sugar at a station in the south- "western region, (a) for the home market, Rs. 4.25 per "pood, or without excise Rs. 2.50; (b) for abroad, Rs. 1.25. "Consequently, the difference or value of transfer is Rs.

" 1.25; but in that case, for the reasons given, Rs. 1.28 to " 1.30 is paid for the transfer."

The attention of the learned Court is particularly directed to the fact that this transfer of the Right of Issue does not involve, as a condition thereto, the export of any sugar whatever. The transfer is effected as a matter of bookkeeping, and the sole condition is that one man's " free sugar " shall diminish *pari passu* with the increase of another's quota. When the transfer is complete the transferor may, as a matter of business expediency, export his increased " surplus " sugar, but he is under no obligation to do so, and he may find it more profitable to leave the " surplus " in the mill, to be transferred to the production account of the following year, under Regulation 19.

It is the prevailing custom to say that the Right of Issue into the home market can be increased only on condition that a certain amount of sugar be exported, but such a statement is due to an entire misapprehension of the Russian Sugar Law.

V.

" TRANSFERS " MISAPPREHENDED BY COURTS BELOW.

The general misconception of the Russian Sugar Law, and the difficulty and abstruseness of its problems, are nowhere better illustrated than in that portion of the opinion of the Courts below dealing with this matter of " Transfers."

The majority opinion of the Board of Classification was adopted as the opinion of the Circuit Court of Appeals, because it " so fully expresses our views and so ably " presents the facts involved herein and the law applic- " able thereto "; and we find the following statement as

the understanding of the Board upon this subject (Rec., p. 30):

"The particular bounty or grant which seems to be "conferred by the Russian Law upon the exportation of "sugar, accrues under Section 39 of said law, providing "that 'a manufacturer may cede to another manufac- "'turer his right to place on the home market free, *i. e.*, "'without the payment of an additional tax, his allotted "'quota of sugar.' This cession can be made only in "accordance with certain rules prescribed in Section 40 "of said law, by which notice of such transfer is required "to be given to the local excise board, authorizing the "reduction of the quantity of free sugar in one mill and "the increase thereof by assignment at another mill.

"This cession or transfer is accomplished by means of "Government certificates or vouchers, which operate as "follows, *e. g.*: Refiner A is authorized to get the benefit "of the failure of Refiner B to supply the home market "with his full quota of free sugar. Hence, Refiner A "becomes willing to pay Refiner B a certain required sum "if he will export a portion of his allotted quota of sugar, "and he accordingly gives A the official evidence of such "exportation in the form of a voucher certificate, as "above described; and this, under the operation of the "Russian Sugar Law and regulations, authorizes A to "sell in the home market, at a tax of R. 1.75 per pood, "an equivalent portion of the sugar produced by him, A, "in excess of his quota."

It is hardly necessary to point out to this learned Court that the cession allowed by Section 39 is not "accomplished by means of government certificates or vouchers," but by entries in the books of the respective mills, as set forth above; that the transfer does not involve the export of any sugar at all, and therefore the assignor cannot give to his assignee "the official evidence of such exportation"; in short, that the Board of Classification has confused the "Transfer" provided for by Sections 39 and 40 with the "Export Certificate" issued under an entirely separate

and distinct section of the Regulations, and for a purpose in no way related to that of the Transfers!

The American Consul falls into the same confusion of thought (Rec., p. 16) when he says:

"It is permitted to export free sugar abroad not only "for the purpose of liberating for admission to the home "market the 'free reserve' of any one factory, but also "of any other factory. For this purpose the owners of "the factories, who enter among themselves into such an "agreement, must notify their local excise officials and "these in turn must notify each other."

In the first sentence the Consul has reference to Export Certificates and in the last to Transfers. The Transfer provided for by Regulations 39 and 40 is not aided by any Export Certificate *for it takes effect regardless of, and in the absence of, any export. After* the transfer the assignor may or may not export, but he then has only "surplus" sugar and no "free sugar" at all, and it is, therefore, incorrect to say that in this transaction he exports "free sugar" abroad for any purpose whatever.

VI.

EXPORT CERTIFICATES FOR "SURPLUS" SUGAR.

We have seen that every manufacturer has his product divided up into, say, 35/50 "free sugar" and 15/50 "surplus sugar," less a small portion set aside as "indivertible reserve." If his factory is located far inland, it is probable that the manufacturer will take advantage of Regulation 19, and transfer his "surplus" to the following year, where it will serve to increase his allowance of "free sugar." If, however, the manufacturer is near a seaport he may prefer to export his "surplus" even at the lower prices obtainable abroad.

In such case Regulation 38 (Rec., pp. 55, 56) requires that the additional tax

"must first be secured in full by cash, excise credit "vouchers, or such funds as are accepted as security for "the tobacco excise, or by the stock of sugar free or of "the free reserve on hand in the factory" (Subdiv. 2).

Then the excise inspector endorses on the bill of lading that the sugar is from "surplus" sugar and issues a *separate certificate*, setting forth the name of the mill, the bill of lading and the weight of the sugar (Subdiv. 1).

"After forwarding the transport across the border, the "Custom House delivers to the shipper, in lieu of refund- "ing the excise (not the additional tax, however) a "*voucher* crediting the same on his sugar excise account "and marks down by endorsement on the certificate of the "excise office presented by him the time of export, the "net weight of the exported sugar and the credit voucher "issued," &c. (Subdiv. 3).

The export certificate must be returned to the inspector of the mill within six months,

"whereupon the additional tax charged upon the ex- "ported sugar is remitted by the excise officer by a corre- "sponding credit in proportion to the quantity of sugar "exported, and the deposits securing the same are re- "leased" (Subdiv. 4).

Thus, for the remission of the normal tax a credit "voucher" is issued; whereas for the remission of the additional tax (to which the "surplus" sugar alone is liable) the export certificate must be returned to the mill *and that is the sole function of this kind of export certificate, i. e., a "surplus" sugar export certificate.*

VII.

EXPORT CERTIFICATES FOR "FREE SUGAR."

The protection of the excise requires that the additional tax should be secured before "surplus" sugar goes from the mill. It is nevertheless a hardship that the exporter should have to tie up a large amount of quick assets until the certificate of export duly indorsed returns to his inspector. Recognizing this, the law allows him to export "free sugar" in the stead of "surplus," and then replace it by transfer from "surplus" account. Thus he has to give security only for the normal tax, while in effect exporting "surplus" sugar.

The note to Regulation 37 provides that

"the mill owner is allowed to export free sugar on ac-
"count of his surplus for the same campaign. For this
"purpose the export is made in the manner hereinafter
"set forth except that the excise office notes on the cer-
"tificate 'from free sugar,' and requires no security for
"the additional tax. Upon the return of the certificate
"with the custom house export mark, the excise office
"credits the exported quantity of sugar to the free sur-
"plus of the mill, if such there be, and increases by a
"like quantity the allowance of free sugar, of which a
"memorandum and an entry in the book must be made."

Suppose, for instance, that a manufacturer located at a seaport has in his factory 350,000 poods of "free sugar" and 150,000 poods of "surplus," and finds it more profitable to export the "surplus" than to carry it over to another campaign. Instead of exporting the actual sugar marked "surplus" and giving security for the double excise, he exports 150,000 poods of "free sugar," gives security for the single tax and obtains from the inspector a certificate that the sugar is "free sugar." At the Custom House the fact of exportation is endorsed on his certificate, and he is given the usual credit "voucher" which obtains

the remission of the single tax for which he has given security. When he presents his certificate, showing that 150,000 poods of "free sugar" have been exported, the inspector in charge of his mill transfers the 150,000 poods of "surplus" sugar remaining there to the "free sugar" account, and the manufacturer now has his original amount of "free sugar" and no "surplus." *This is the function of the "free sugar" export certificate: to obtain a transfer of sugar from "surplus" to "free" account.*

The plain intent of the Government in granting this privilege was to facilitate business and make the burden of the regulations as light as possible; and to this the American Consul testifies (Rec., p. 61), when he says that the right was granted to the manufacturer

"to avoid the necessity of giving securities as guarantee
"for additional excise and in general for the greater free-
"dom in business transactions."

This testimony as to the intent of the law is important as rebutting the oft-repeated claim that in this portion of the Sugar Law the Russian Government conceals the alleged bounty.

VIII.

Traffic in "Free Sugar" Export Certificates.

We have seen that when a manufacturer exports "surplus" sugar he obtains a credit voucher remitting the normal excise, and a "surplus" certificate of export which entitles him to the remission of the additional tax. When he exports "free sugar" he receives the same voucher for the normal excise and a certificate attesting that the sugar exported was "free sugar." This "free sugar" certificate does not, as in the case of the "surplus" certificate, serve to remit the additional tax, for "free sugar" is not sub-

ject to such tax; but upon presentation of the certificate to the inspector of his mill, the shipper is entitled to have transferred from "surplus" to "free sugar" account an amount of sugar equal to the "free sugar" shown by the certificate to have been exported.

This "free sugar" export certificate is negotiable and any holder thereof is entitled to have transferred a like amount of sugar from "surplus" to "free sugar" account. The total amount of sugar allowed by the ministers for national consumption has been depleted by the export of this "free sugar"; the certificate attests that fact, and the holder thereof, whether he be the exporter or the purchaser of the certificate, (for it is immaterial to the Government who exercises this Right of Issue), has the right to *restore the depletion* by issuing upon the home market as "free sugar" an equal amount of his "surplus." So it is stipulated in this case:

"That said sugar certificates are sold to and used by "sugar manufacturers or refiners who are thereby en- "abled to transfer from their 'free reserve' or 'free "surplus' to their 'free sugar' an amount of sugar "equal to the amount shown by said certificates to have "been exported, which amount may then be sold for "domestic consumption on paying the ordinary tax of R. "1.75 per pood (to which free sugar is regularly sub- "ject) instead of a tax of R. 3.50 per pood" (Stip. 8, Rec. p. 10).

IX.

PURCHASE PRICE OF "FREE SUGAR" EXPORT CERTIFICATES.

The "free sugar" certificate, like the "Transfer," is valuable solely because it represents the "Right of Issue" into the home market, and as this Right is more valuable to the Moscow manufacturer than to the exporter, situ-

ated probably at an obscure seaport town, so it is the Moscow manufacturer who purchases the certificate and is enabled thereby to convert a like amount of his useless "surplus" into "free sugar" for sale on his profitable local market.

As in the case of the "Transfer," the total of "free sugar" allowed to the two manufacturers has not been increased; nor the total export, for what one manufacturer exports, the other withdraws from export; but the Moscow manufacturer has done all the selling on the home market and the seaport manufacturer all the exporting. The former has secured the large profits in the Moscow market and saved his freight to the coast; while, on the other hand, the seaport merchant has sacrificed the profits on his local market which, while not as great as those at Moscow, are nevertheless larger than he can obtain abroad.

Obviously, then, as in the case of the "Transfer," the price which the seaport merchant must receive for thus transferring to another his Right of Issue into the home market—that is to say, the price which he must receive for his export certificate, is the difference between what he would have received had he sold his "free sugar" on the home market, and the price he will obtain on the foreign market. So it is stipulated in this case (Stip. 7, Rec., p. 9):

"That the Government issued to the exporter a cer-
"tificate certifying that he had exported such a
"quantity of so-called *free sugar;* that the said
"certificates have a substantial market value
"and are transferable, and *that the price thereof is*
"*usually determined by the difference existing at the*
"*time between the price obtainable for the sugar on the*
"*home market and the price obtainable abroad.*"

In other words, as in the case of the "Transfer," if the price in the home market is R. 2.50 per pood and the

foreign price R. 1.25, the certificate will be worth the difference between these two, *and the exporter will receive the same gross amount as if he had not exported his "free sugar," but had sold it in the home market.* Thus:

By sale at home he obtains the market price		R. 2.50
By sale abroad he obtains the foreign market price	R. 1.25	
Also the price of certificate	R. 1.25	
		R. 2.50

In practice, of course, as in the case of all commodities, the market value of these certificates must vary according to the demand and supply, but the theory underlying the transaction is always this, that the exporter shall suffer no loss because he has exported his "free sugar" instead of selling it in the home market.

X.

EXPORTATION IS NOT THE FOUNDATION OF THE VALUE OF "FREE SUGAR" EXPORT CERTIFICATES.

Contrasting "Transfers," "free sugar export certificates" and "surplus sugar export certificates," it will be noted that "free sugar certificates" are more nearly assimilable to "Transfers" than to "surplus certificates"; in fact, the two kinds of export certificates have nothing in common except that they attest the simple fact of exportation.

The "free sugar certificate" does not owe its value to the fact that a certain amount of sugar has been *exported* from Russia, but to the fact that the total "free sugar" required for national consumption has been thereby *depleted*, and the purchaser of the certificate acquires the right to make good the depletion, *i. e.*, to issue "free sugar" into the home market. *Since "surplus"*

certificates do not attest this depletion, they have no pecuniary value except as vouchers for the remission of the additional tax (*supra*, p. 17); on the other hand, "Transfers" involve no export at all, and yet, as they attest the depletion of the "free sugar" total (by transfer of sugar from "free" to "surplus" account on the books of the mill), "Transfers" *have the same market value* as "free sugar" export certificates (*supra*, pp. 13, 21).

Since *exportation* is attested by both "free" and "surplus" certificates, and yet the former have a substantial market value and the latter none at all; and since the *depletion* of the total "free sugar" is attested both by "Transfers" involving no export at all, and by "free sugar" export certificates, and these have the same market value; therefore it is obvious that *it is not the fact of exportation but the fact of depletion which gives the "free sugar" export certificate its value.*

IX.

The alleged "bounty on exportation."

It is the purchase price of this "free sugar" export certificate which the courts below have held to constitute a bounty on exportation within the scope of Section Five.

His Honor, Judge Goff, reading the opinion of the Circuit Court of Appeals, says (Rec., p. 83):

"We find that the Russian exporter of sugar obtains "from his government a certificate, solely because of such "exportation, which is worth in the open markets of that "country from R. 1.25 to R. 1.65 per pood or from 1.8 "to 2.35 cents per pound; therefore, we hold that the "Government of Russia does secure to the exporter "of that country, as the inevitable result of its action, a "money reward or gratuity whenever he exports sugar "from Russia."

The majority of the Board of Classification held that a bounty was paid upon the exportation of this sugar because

" the certificate which the Government issued to him upon
" the exportation of his sugar had a substantial market
" value, and was transferable and operated as a premium,
" grant, bonus or reward."

The Honorable Secretary of the Treasury has stated that

" the amount of such bonus, as shown by the reports of
" our Consul at Odessa, is represented by the price of ex-
" port certificates which are sold by the exporters of sugar
" to those refiners who have an excess of sugar for sale in
" the home market; the minimum price of such certificates
" is one rouble per pood " (Appendix to the Brief of the counsel to the Treasury Department at the hearing of this case before the Board of Classification).

XII.

CONCLUSION.

It is submitted, respectfully and with the utmost deference, that the opinions of the learned Courts below state only half the truth.

It is true that the exporter " receives a money reward " or gratuity whenever he exports sugar from Russia." It is equally true, however, that he receives the same money reward or gratuity when he does *not* export his sugar, but sells it on the home market. In other words, the " money reward or gratuity," if it be a bounty at all, *is not conditioned on exportation, and hence not within the purview of Section five.*

Moreover, this " money reward or gratuity " is the equivalent of, and substitute for, the high prices on the protected home market which the exporter would have

obtained had he sold his sugar therein. Therefore, even if Section five were not limited to those bounties conditioned solely on exportation, the section would not apply, for Congress cannot have intended to penalize as bounties the enhanced prices due to the operation of a protective tariff.

In the following Points, counsel will endeavor to maintain these propositions, and the further proposition that the remission of an excise tax is not, as claimed by the Board of Classification, a bounty on exportation.

POINT ONE.

Section Five applies only to bounties on exportation. and the purchase-price of "free sugar" export certificates is not such a bounty.

I.

Section five applies only to bounties on exportation as distinguished from bounties on production.

The bounty mentioned in the section is expressly a "bounty or grant *upon the exportation* of any article of "merchandise." The prototype of Section five was Section 182½ of the Tariff Act of 1894, which levied an additional duty on all sugars imported from a country "which *at the time the same are exported therefrom*, "pays, directly or indirectly, *a bounty on the export* "*thereof*."

It is evident that "bounties on exportation" must, as the name implies, be *conditioned* on exportation, and that exportation furnishes the consideration therefor. As said by Mr. Justice Brown, in Allen *vs.* Smith (173 U. S., at 402):

"Bounties granted by a Government are never pure "donations, but are allowed either in consideration of "services rendered, or to be rendered, objects of public "interest to be obtained, production or manufacture to "be stimulated or moral obligations to be recognized. "To grant a bounty irrespective altogether of these con- "siderations would be an act of pure agrarianism, and to "determine who is entitled to the benefit of the bounty "is but little more than to determine who has rendered "the consideration."

Bounties on exportation, therefore, are to be carefully distinguished from bounties on production, for exporta-

tion forms no part of the consideration for the latter. Bounties on production accrue to all who produce, regardless of exportation; whereas bounties on exportation accrue to those only who export. It is true that a commodity which has received the benefit of a bounty on production may be subsequently exported, but that does not convert the bounty into a bounty on exportation, for exportation formed no part of the consideration therefor.

This distinction between bounties on production and bounties on exportation was recognized by the Brussels Sugar Conference of 1898, which classified bounties as:

"(*a.*) The direct advantages granted in case of exportation;

"(*b.*) The direct advantages granted to production" (Rep. of Conf., pp. 61, 65).

So, too, the treaty proposed by the Sugar Conference of 1902 binds the parties to suppress:

"(*a.*) The direct bounties granted to exports.

"(*b.*) The direct bounties granted to production."

Expressio unius exclusio alterius est.

By specifying only "bounties upon exportation" Congress must have intended to *exclude* bounties on production from the operation of Section five, and such was the view of the Courts below.

In the Circuit Court of Appeals, his Honor Judge Goff, reading the opinion of the Court, finds that the Russian exporter receives a bounty within the meaning of Section five, because he

"obtains from his Government a certificate *solely because* "*of such exportation*, which is worth," etc. (Rec., p. 82). And again: "Therefore, we hold that the Government of "Russia does secure to the exporter of that country, as "the inevitable result of its action, a money reward or "gratuity, *whenever he exports sugar from Russia.*"

In the Circuit Court, Judge Morris says that the sole question is whether there was bestowed

"*on the exportation* of this sugar, directly or indirectly, "any bounty or grant" (Rec., p. 74); and the Board of Classification is "impelled to the conclusion that the Rus- "sian sugar statutes and regulations operate to pay or "bestow a bounty or grant, directly or indirectly, *upon* "*the exportation of sugar*" (Rec., p. 34).

Discussing this section in its application to the Netherlands sugar law, the Circuit Court of Appeals for the Second Circuit held that the bounty paid thereunder was within the scope of the section, *because it was a bounty conditioned on exportation and not a bounty on production*, Judge Lacombe saying that the law in effect provided that

"those who export their sugar may keep this bounty, "those who do not must forthwith return it to the Gov- "ernment" (Hills Bros. Co. *vs.* United States, 107 Fed. Rep., 107).

Unless, therefore, the bounty alleged to be paid by the Russian Government be *conditioned solely on exportation*, and in such fashion that the exporter gets it and the non-exporter does not; unless, in other words, the exporter is *placed in a better position than if he had not exported*, then the bounty is not a true bounty on exportation, and Section five can have no application thereto.

II.

The purchase price of the "free sugar" export certificate is not a bounty on exportation, and hence not within the scope of Section five.

It is stipulated in this case (Stip. No. 7, Rec., p. 9), that the price of the "free sugar" certificate is

"usually determined by the difference existing at the "time between the price obtainable for the sugar on the "home market and the price obtainable abroad."

If, for instance, a manufacturer sells his "free sugar" on the home market he receives the home market price of say R. 2.50 per pood; whereas, if he exports his "free sugar" he receives the foreign price, say R. 1.25, and R. 1.25 as the price of his export certificate. (*Supra*, pp. 21, 22).

In other words, by exporting his "free sugar" and selling his export certificate the exporter receives *exactly the same amount* he would have received had he sold his "free sugar" on the home market. All producers fare equally well before the Law; those who sell at home receive the high prices ensured on the home market, while those who export receive what is equivalent thereto, viz.: the foreign market price plus the price of the export certificate.

Here, then, is no "bounty on exportation," for the reward of the manufacturer is not conditioned on exportation, nor is it greater than it would have been had he not exported. Bounty on production this reward may be, but certainly not bounty on exportation, for it is a contradiction in terms to call that a bounty on exportation which is received, in one form or another, by all manufacturers alike, whether they export or do not export.

It is true, as stated in the opinion of the learned Circuit Court of Appeals, that the Government of Russia does secure to the exporter "a money reward or gratuity whenever he exports sugar from Russia." It is equally true, however, that the manufacturer receives the same "money reward or gratuity" whenever he does *not* export, and therein lies the defect in the reasoning of the learned Court below, for to be a bounty on exportation it is not enough that the "money reward or gratuity" should be

received on exportation; it is essential that it should be *not* received in the event of non-exportation.

The Russian manufacturer obtains, as the price of his certificate, a "money reward or gratuity whenever he "exports sugar from Russia," *but as this sum, added to the price he receives for his sugar abroad, exactly equals the amount he would have received had he sold his sugar on the home market, it is evident that he obtains the very same "money reward or gratuity" whenever he does not "export sugar from Russia," only it is in the shape of the high prices ensured on the profitable home market.*

Inasmuch, therefore, as this "money reward or gratuity" is not conditioned solely on exportation and does not place the exporter in any better position than if he had not exported, it cannot constitute a "bounty upon exportation" within the purview of Section five, and the section can have no application thereto.

III.

The purchase price of the "free sugar" export certificate is no more a bounty on exportation than is the right represented by the certificate, viz.: the right to issue free sugar into the home market. Merely liquidating the value of the right cannot convert that into a bounty on exportation which was not one before.

When a manufacturer exports "free sugar" for account of surplus, thereby avoiding the necessity of giving security for the additional tax (*supra*, p. 18), he obtains a certificate attesting the fact, and when he presents this certificate to the inspector of his mill an equal amount of "surplus" sugar is transferred to "free sugar" account. *In the hands of the exporter, therefore, the certificate simply represents his original right to issue his quota of "free sugar" into the home market at the normal tax;*

and it is this Right of Issue that the exporter transfers when he sells his export certificate (Stip. 8, Rec., p. 10).

Had the exporter chosen to exercise this original Right of Issue instead of transferring it to another, he could have done so *regardless of exportation*, for there is nothing in the Russian Law requiring exportation of any portion of his product as a condition precedent to selling the remainder on the home market. (*Infra*, Point Three, where this subject is examined *in extenso*.) Therefore, this original Right of Issue, in the hands of the manufacturer, cannot be considered a "bounty on exportation" as the term is used in Section five. (*Supra*, pp. 26 *et seq.*)

Not being a bounty on exportation in the hands of the original owner, the Right of Issue does not become a bounty on exportation simply by being transferred, nor can the purchase price thereof be considered such a bounty.

In other words, the purchase price of the "free sugar" export certificate is merely a liquidation of the value of the right represented thereby, viz., the right to issue "free sugar" into the home market at the normal excise. *As this Right of Issue is not conditioned on exportation, and therefore not a bounty on exportation, it follows that the purchase price of the Right, the money-equivalent thereof, cannot be a bounty on exportation, for merely converting the Right into money cannot transform that into a bounty which was not one before.*

Nor can it be said that exportation is a condition precedent to the *transfer* of the Right of Issue, and that therefore the price thereof is in effect a bounty on exportation. It is true that the export certificate itself is, as its name implies, conditioned on exportation; not so, however, the transfer of the Right represented thereby; and the proof lies in the fact that this Right may be equally well transferred by direct "Transfer" which, as we have seen (*supra*, p. 14), involves no export at all, but merely an entry in the books of the respective mills.

POINT TWO.

The purchase price of "free sugar" export certificates would not be a bounty within the scope of Section Five even if the section were not limited to bounties conditioned on exportation.

I.

By means of a high protective tariff and by further limiting the market to a portion only of the product, the Russian Government creates a profitable home market and ensures to the manufacturer a high price for his sugar (Rep. of Conf., p. 59). The purchase price of the Right of Issue into this profitable home market, whether it be represented by a "Transfer" or by an "export certificate", is the precise money-equivalent of, and a substitute for, this artificial enhancement of prices, for it is measured by the difference prevailing at the time between the home and the foreign prices of sugar (*supra*, pp. 20, 21, 22).

The question, therefore, resolves itself into this: Do the high prices ensured by an artificial limitation of the home market, whether by a protective tariff or otherwise, constitute such a bounty as is condemned in Section five?

II.

It is not denied that the enhanced prices secured to manufacturers by the operation of a high protective tariff constitute a virtual bounty *on production*.

This was very clearly pointed out by Alexander Hamilton in his famous "Report on Manufactures":

"Duties of this nature (protective), evidently amount "to a virtual bounty on the domestic fabrics, since by en-

"hancing the charges on foreign articles they enable the "national manufacturers to undersell their foreign com- "petitors."

In *United States* v. *Realty Co.*, (163 U. S., 427, at 434), Mr. Justice Peckham expounds the same theory in discussing the bounty provisions of the Tariff Act of 1890. He says:

"The tariff theretofore had been very high on imported "sugar, and the native industry had thereby been encour- "aged, fostered and greatly increased. The subject of "how to treat this industry was under discussion in Con- "gress while the tariff act of 1890 was before it and it "finally decided the question by enacting the bounty "clause of the Act. Before that time the revenue on im- "ported sugar had amounted to nearly $60,000,000 in one "year. To put sugar on the free list would reduce the "revenue that amount, but at the same time it might, as "was urged in Congress, ruin the persons engaged in the "industry in this country. So the tariff on sugar was "reduced, while at the same time *a bounty was placed* "*upon its production here of an amount which it was* "*thought would equal the protection the industry had* "*theretofore enjoyed under the tariff.*"

The same analogy between protective duties and bounties was set forth by Judge Pardee, in *Calder* v. *Henderson* (54 Fed., 802, 803), as follows:

"Prior to 1890 the production of sugar was fostered by "the Government of the United States by a protective "tariff, which imposed such duties upon imported sugar "as practically enabled the producers in this country to "obtain a price for the sugar produced by them, "compensatory of the cost of production; it be- "ing well understood that *without the enhanced* "*price resulting from the tariff*, sugar in quantities "could only be produced in the United States at a "loss to the producer. In 1890 the Government of "the United States, *without changing its policy in respect*

" *to sugar produced*, changed the method of encouraging " production by practically placing sugar upon the free " list and enacting the bounty system."

The Brussels Sugar Conference of 1898 reached the conclusion that

" advantages similar to those resulting from the bounties " hereinbefore defined may be derived from the disproportion between the rate of customs duties, and that of " consumption dues (surtaxes)." (Rep. of Conf., pp. 61, 65.)

Finally, the advantages secured to domestic producers by the operation of a high protective tariff are explicitly declared to be bounties by the Brussels Sugar Conference of 1902. The treaty proposed by the Conference provides that the contracting parties shall suppress direct and indirect bounties, notably:

" (*f.*) The advantages derived from any surtax in excess of the rate fixed by Article II." By Article III. the surtax is " limited to a maximum of 6 francs per " 100 kilograms ($1.15 for 220 pounds) for the refined sugar " and the sugars assimilable thereto, and 5.50 francs " ($1.06) for other sugars; that is to say, the difference " between the rate of duty or taxation to which foreign " sugars are subjected and that imposed on the home " product."

The Right Hon. Lord Pirbright, P. C., President of the Sugar Conference of 1888, in an article appearing in *The Empire Review* for April, 1902, says, page 264:

" The surtax has been admitted to be a most dangerous " form of bounty; but if any confirmation were want- " ing that surtax is a bounty, it is to be found in Article " I. of the present convention " (quoting the provisions set forth above).

III.

The question, however, is not whether protective duties are indirect bounties, but whether Congress *intended to include them within the scope of Section five*, and it is plain that Congress could not have had any such intention.

This very Section five is contained in a protective tariff act, "An act to provide Revenue for the Government "and to encourage the Industries of the United States"; and by the provisions thereof a complete and extensive system of protective duties is established. If protective duties be among the "bounties or grants" penalized in Section five, then Congress must have intended to condemn as bounty-paying on the part of other nations a system which has for many years been an integral part of the economic policy of the United States,—to condemn in one section of an Act the very system established by the rest of the Act. Such a contention would be absurd.

It would hardly be claimed, for instance, that advantages similar to those accruing to American manufacturers of distilled spirits were considered by Congress as among the bounties or grants condemned by Section five. Yet there is a perfect analogy between the position of the American distiller and that of the Russian sugar manufacturer. Both are ensured a profitable home market by the high protective tariff; both are subject to heavy excise taxes which are remitted on exportation; both are under the constant and inflexible supervision of Government inspectors; and, finally, it is well known that in the United States a combination of manufacturers secures by agreement that further limitation of the supply for home consumption which in Russia is provided for by law. If the profits of the American distiller do not constitute a "bounty or grant" within the scope of Section five, then no more do the profits of the Russian sugar manufacturer.

IV.

The action of the Russian Government in further limiting the market to a portion only of the product distinguishes the system in degree, but not in principle, from the American system. The artificial limitation of the supply on the home market is the foundation of the enhancement of prices in both cases, *and there is no distinction in principle between limiting a market to home producers by protective tariff and further limiting it to a portion of the product by statute.*

In the absence of customs duties prices in the home market are regulated by the relation between the domestic demand and the supply from all sources, domestic and foreign. A high tariff enhances these prices by cutting off a portion of the supply from abroad, and a prohibitive tariff further enhances them by eliminating foreign supply altogether. If now the supply is still further reduced by cutting off a portion of the domestic production it is obvious that the resulting enhancement of prices differs in degree, but that the underlying cause is the same, viz., the limitation of supply, demand being normal.

The question, therefore, always remains the same: do artificial limitations of a market constitute such bounties as are condemned in Section five?

V.

The wording of the section excludes the theory that Congress intended to include therein the "virtual bounties" resulting from the operation of protective tariffs or other artificial limitations of the home market.

Such bounties are, truly, "indirect bounties," *but the section does not mention "indirect bounties."* It applies only when a country shall "*pay or bestow, directly or indirectly,*" a bounty and there is a vast difference between

paying an *indirect bounty*, and *indirectly paying* a bounty. The Netherlands Sugar Law is an illustration of the *indirect payment* of a bounty. By the Netherlands Law a direct bounty is credited to all sugar produced, and an excise tax in a larger amount is levied thereon. The tax is remitted on export, leaving the direct bounty to be paid to exporters in cash. This system was held in the *Hills Brothers Case* (107 Fed., 107), to be within the scope of Section five, and the case is a good example of the efforts of the Courts to reach direct bounties on export, even though they be *paid* in an indirect and circuitous way.

CONCLUSION.

The purchase price of the export certificate, therefore, would not be a bounty within the scope of Section five, even if the latter were not limited to bounties conditioned on exportation, unless we are prepared to admit that Congress intended to penalize as "bounties" the enhanced prices due to artificial limitations of the home market by protective tariff or otherwise.

In its final analysis the Russian system is only an extension of the American protective tariff system, and the purchase price of the export certificate is the money-equivalent of the high prices on the home market ensured thereby.

It is not denied that, by limiting a market to home producers, protective tariffs artificially enhance prices, and thereby amount to a "virtual bounty" on the domestic product. The question, however, is not whether these artificially high prices are a "virtual bounty" *but whether Congress intended the phrase "pay or bestow a bounty or grant" to have any such extreme application;* and it could not have been the intention of Congress to condemn as bounty-paying in one section of an act, the very system established by the other sections of the act.

POINT THREE.

The Russian law does not, either directly or indirectly, require the manufacturer to export any portion of his sugar as a condition precedent to selling the balance on the home market. On the contrary, the law invites the manufacturer not to export but to carry over his surplus into the next campaign. This disposes of all arguments based on a supposed obligation to export in order to obtain the benefit of the artificially high prices in the home market.

The right to place on the home market "free" or "surplus" sugar upon payment of the excise tax is *absolute and unconditional.* It is stipulated in this case that,

"Under the Russian law all sugar is divided into "the three following classes: (*a.*) Free sugar, which "consists of a certain quantity of sugar which the Rus- "sian government *permits* a factory or refinery to sell "for home consumption under an excise tax of R. 1.75 "per pood. (*b.*) An obligatory or indivertible reserve. "* * * (*c.*) Free reserve *or* free surplus, which "* * * cannot be sold for home consumption *except* "upon payment of the regular tax of R. 1.75 and an ad- "ditional tax of R. 1.75, or R. 3.50 in all" (Rec., pp. 8, 9.)

The American Consul says (Rec., pp. 60, 61), that

"Each factory is *granted* the right to place on the "home market with payment at fixed dates of an excise "of R. 1.75 per pood" its allowance of 'free sugar,' and that its "surplus" sugar "may be placed on the home "market only on payment for each pood of R. 1.75 so- "called additional excise, independently of the payment

"of the excise at R. 1. 75 on the general basis." The Consul then gives an example wherein a certain factory has 12,456,000 poods of "surplus" sugar "for the export "board, when it is freed from excise, or for placing in "the home market, but with payment in this latter case "of the additional excise."

Nor can it be claimed that the law indirectly forces exportation because the additional excise is prohibitory and the manufacturer cannot do otherwise than export, *Exportation is not the only alternative to selling in the home market*, for the "surplus" may be left in the mill, where it is not subject to any tax (Law, § 5, Reg. 20; Rec., pp. 41, 51), *or it may carried over to the production account of the following campaign, as provided for in Regulation 19*, and the latter is the course usually adopted.

Regulation 19 (Rec., p. 50), provides that

"if a mill owner should want the free surplus of sugar "left at the mill toward the end of the campaign to be "canceled off the surplus account and transferred to the "sugar production of the coming campaign, he must "file with the Excise Board on or before August 1, a "special declaration to that effect, upon which the excise "officers in charge shall on September 1st duly enter in "their books of the closed and the coming campaign "the cancellation of such surplus and the transfer thereof "to the production of the new campaign."

On this "production of the new campaign," *as increased by the previous year's "surplus,"* is figured the percentage of "free sugar" allowed to each factory; and thus, by merely giving the requisite notice under Regulation 19, *the manufacturer can convert say 70 per cent. of his useless "surplus" into "free sugar," which he can sell on the profitable home market upon paying the normal excise.* It needs no argument to prove that the manufac-

turer is more likely to take this course than to export his "surplus" to the inferior foreign market.

Here, then, are no obligations to export, but rather inducements *not* to export. The market for "free sugar" is made highly attractive, and if the manufacturer will hold his "surplus" sugar for the few weeks intervening between the close of one campaign and the opening of the next, he can sell nearly three-quarters of it as "free sugar." By repeating this process for a year or two nearly the whole production of any campaign can be converted into "free sugar," and sold on the home market at the normal excise.

POINT FOUR.

The Brussels Sugar Conferences decided, not that Russia paid a bounty on exportation, but that the artificially high prices ensured on the home market by the high protective tariff acted as virtual bounties on production, enabling the manufacturer to endure losses abroad. The Conference covered the whole field of artificial advantages accorded by government, and if its conclusions are to be adopted the United States is the greatest bounty-paying country in the world. Congress could never have intended the words "bounty or grant" as used in Section five, to have any such extreme application.

One of the bounties whose abolition is desirable was declared by the Conference of 1898 to be

"(*b.*) The direct advantages granted to *production.*" It was further decided that "advantages similar to "those hereinbefore defined, may be derived from the dis- "proportion between the rate of customs duties and that "of consumption dues (surtaxes) especially when the pub- "lic powers impose, incite or encourage combinations "among sugar producers." (Rep. of Conf. p. 51.)

The gist of the oft-quoted Austrian delegate's contribution to the Conference, if carefully scrutinized, will be found to be only that Russia forces the consumer to pay high prices for sugar, thereby enabling the manufacturer to endure losses abroad; but even the Austrian delegate did not maintain that this bounty was conditioned on exportation.

The delegate finds (Rep. of Conf., p. 60) that "there "are annually sold in Russia at least 33 million poods at "R.1.50 per pood more than the price quoted in the "markets of the world. This represents for the aggre- "gate of Russian factories a favor which amounts to 49.5 "million rubles, * * * tantamount to a premium of "17.60 francs per kilo of sugar produced."

Precisely! The artificially high prices amount to a premium on sugar *produced*; a bounty on production, but not a bounty on exportation.

An idea of the results that would follow if the United States were to adopt the conclusions of the Sugar Conference of 1902 may be obtained by applying to American tariff schedules the rules laid down by the Conference. Thus, by the proposed Treaty (*supra*, p. 34), the surtax in excess of $1.15 for 220 pounds is declared to be a bounty, and the contracting parties bind themselves to impose a countervailing duty to an equal amount; by Paragraph 209 of the very Act containing Section 5, the Tariff Act of 1897, refined sugar is subject to an import duty of 1.95 cents per pound, and as there is no excise tax on sugar in the United States, this whole amount is "surtax." On 220 pounds the surtax on American imports of sugar amounts to $4.29, and, according to the Brussels Treaty, *$3.14 thereof is a bounty on domestic sugar which the parties will countervail by additional duties!*

Nor is this all. The definition of bounties adopted in the Treaty applies equally well to other products besides sugar. Taking the cost of sugar production at 2 cents per pound, or $4.40 per 220 pounds, the *ad valorem* duty must not exceed 115/440, or 26.1%, and we must conclude that any commodity produced in the United States *is bounty-fed if the duty on the importation of that commodity from abroad exceeds 26.1%*.

Obviously, the "bounties or grants" of Section 5 are not those contemplated by the Brussels Conference.

POINT FIVE.

The remission of excise taxes on the exportation of sugar is not a bounty or grant on exportation as the terms are used in Section five.

I.

The Board of Classification held that a bounty was paid on the exportation of this sugar, because—

"FIRST.—Upon the exportation of the sugar, the Government remitted or refunded the excise tax due thereon, or otherwise canceled the indebtedness of the sugar manufacturer, so that he was enabled to place his product upon the market free from the burden of either the regular or additional tax."

As the sugar in question is "free sugar," and not subject to any "additional tax," (Stip. 5, p. 9), it is submitted that the manufacturer would have been enabled to place it on the market "free from the burden of the * * * * additional tax," even if the Government had not "remitted or refunded the excise tax due thereon."

The bounty, therefore, cannot be found in the supposed remission of any "additional tax," for none was ever imposed on this sugar.

II.

To include the remission of excise taxes or of customs dues, within the scope of "bounties or grants," as the terms are used in Section five, would be to attribute to Congress an intention to condemn as bounty-paying *an important integral part of the revenue system of the United States.* Since 1794 the United States has had a system of draw-

backs which has been so elaborated that annually millions of dollars in internal revenue taxes and customs dues are refunded to exporters.

Section 15 of this very Act of July 24, 1897, provides "that all articles manufactured in whole or in part of im- "ported materials, or of materials subject to internal "revenue tax and intended for exportation without "being charged with duty and without hav- "ing an internal revenue stamp affixed thereto shall be "manufactured in bonded warehouses, and when ex- "ported directly therefrom shall be exempt from duty "and from the requirements relating to revenue stamps"

Section 30 of the same act provides that "when im- "ported materials on which duties have been paid are "used in the manufacture of articles manufactured or "produced in the United States, there shall be allowed "on the exportation of such articles a drawback equal in "amount to the duties paid on the materials used, less one "per centum of such duties."

Section 3329 of the Revised Statutes provides that "Dis- "tilled spirits upon which all taxes have been paid, "may be exported, with the privilege of drawback."

If the learned Court below was right in spelling out a bounty from the fact that "upon the exportation of the "sugar the Government remitted or otherwise canceled "the indebtedness of the sugar manufacturer, so that he "was enabled to place his product upon the market free "from the burden of either the regular or additional ex- "cise tax," then the United States Government pays a bounty upon the exportation of distilled spirits and of "all articles manufactured in whole or in part of imported "materials, or of materials subject to internal revenue "tax," for the manufacturer thereof is equally with the Russian sugar manufacturer "enabled to place his prod- "uct upon the market free from the burden of the excise "tax."

Congress could not have intended the words "bounty or grant," as used in Section five, to have any such comprehensive scope.

III.

The bounties contemplated by Congress are such artificial aids as tend to lower the natural cost of foreign production, thereby neutralizing the effect of the protective duties estimated with reference to that natural cost.

A drawback or the remission of an excise tax does not tend to lower the natural cost of production. To quote an old authority:

"A drawback is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all. It differs in this from a bounty, that the latter enables a commodity to be sold abroad for less than its natural cost; whereas, a drawback enables it to be sold exactly at its natural cost. Drawbacks do not occasion the exportation of a greater quantity of goods than would have been exported had no duty been imposed." Cited in part by Mr Chief Justice Fuller in the Passavant Case (169 U. S., at 23).

IV.

To maintain that a drawback is a bounty is equivalent to saying that an omission to tax is a bounty. The fact that goods are exported free from tax does not make them bounty fed as regards the foreign market. On the contrary unless the excise tax be remitted on export *it becomes an export duty when the goods are sold abroad.*

V.

It will not do to say that, while the mere remission of the excise tax is not a bounty, it becomes a bounty when

taken in connection with the "free sugar" export certificate. The two are utterly and entirely distinct from each other.

The remission of the normal tax is evidenced by a "voucher;" the remission of the additional tax by the "surplus" sugar export certificate (*supra*, pp. 17). The "free sugar" certificate is not a voucher for either tax (*supra*, p. 19), and its market value is exclusive of and entirely uninfluenced by the fact that the normal tax has been remitted on the "free sugar" exported; and this for the very good reason that the purchaser of the certificate must himself pay the normal tax when he issues the "free sugar" on the home market.

Whether the right to issue "free sugar" be vested in the original manufacturer or in the purchaser of the certificate, it is always the right to issue *upon payment of the normal tax* (Stipulation 8, Rec., p. 10). By purchasing the certificate, the purchaser does not acquire any right to the remission of the normal tax; hence it is evident that the fact of remission can play no part in fixing the price of the certificate.

Therefore, if the purchase price of the certificate be a bounty, as claimed by the Government, it must be judged as such regardless of the remission of the excise tax, *and the fact that the tax is remitted on exportation cannot give to the "bounty" the necessary quality of being "conditioned on exportation."*

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POINT SIX.

We invoke the rule laid down by this Court in Hartranft vs. Wiegmann (121 U.S., 608, 616), and in many other cases, that, if the question is one of doubt, the doubt must be resolved in favor of the importer "as "duties are never imposed on the citizen "upon vague or doubtful interpretations."

"Laws imposing duties are never construed beyond the "natural import of the language, and duties are never "imposed upon the citizens upon doubtful interpreta- "tions, for every duty imposes a burden on the public at "large, and is construed strictly, and must be made "out in a clear and determinate manner from the lan- "guage of the statute." Per Mr. Justice Story, in Adams *vs.* Bancroft (3 Sumner, 38).

It may very well be that the American manufacturer needs and should have protection against foreign monopolies, whether they be such as are conferred on a whole nation by the operation of a protective tariff, or on a whole nation as to a portion of its product as in the Russian system, or on a single individual as in the case of a patent right. The conferring of a monopoly, either partial or complete, enhances the price which the consumer may be compelled to pay, and this certainly acts as a detriment to the foreign market by enabling the manufacturer to accept therein a very small profit, or even none at all, on his exported surplus.

Congress, however, has not, in Section 5, indicated any intention to afford protection to the American manufacturer against this kind of competition. It cannot be said that a "country, dependency or colony" does "pay "or bestow, directly or indirectly, a bounty or grant upon

"exportation" when it merely creates a profitable home market for its manufacturers, and issues to the citizen a negotiable certificate which is the documentary evidence of his right to sell in this profitable market. Because the value of this right is liquidated on transfer, the purchase price does not become, thereby, a bounty on exportation, nor is this alleged bounty *paid by a "country, dependency or colony"* when one citizen pays to another the purchase price of this transfer.

To give any such comprehensive and far-reaching effect to Section 5, would be indeed to impose duties on the citizen on exceedingly "vague and doubtful interpretations."

CONCLUSION.

Because the alleged bounty is not conditioned on exportation; because it is not such a bounty as would be included in Section five even if the latter were not limited to bounties on exportation; because, in short, Section five is not to be extended to distortion in order to cover all possible benefits conferred on manufacturers by the operation of wise and beneficent laws; therefore, it is respectfully submitted that no bounty or grant upon the exportation of these sugars was paid by the Russian Government, within the scope of Section five of the Tariff Act of 1897, and no additional duty should have been levied thereon upon importation into the United States.

WASHINGTON, October Term, 1902.

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